II.

JURISDICTIONAL STATEMENT.

No Reviewable Federal Question Is Here Presented for the Reason That the Matter Involved Is Solely One of Statutory Construction; the Validity of Pertinent Ohio Statutes Has Not Been Challenged.

In *Glenn v. Garth*, 147 U. S. 360, 13 Sup. Ct. 350, 37 L. Ed. 203 (1892), an action was commenced in New York seeking recovery of the amount of two assessments made by the courts of the state of Virginia against the stockholders of a certain Virginia corporation. The liability of the defendants depended upon a construction of Virginia statutes. The New York courts decided in favor of the defendants, and the plaintiff sued out a writ of error in this court. In dismissing the writ for want of jurisdiction, the court said:

> "If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

Moreover, to paraphrase and apply to the instant case the language of this court in the concluding paragraph of the decision in *Glenn v. Garth:*

> "This record may be searched in vain for any proof that, as a matter of fact, the public acts of

Ohio (Virginia) had by law or usage in Ohio (Virginia), any other effect than was given them in California (New York)."

In *Lloyd v. Matthews,* 155 U. S. 222, 15 Sup. Ct. 70, 30 L. Ed. 128 (1894), a writ of error was likewise dismissed for want of jurisdiction with the observation, applicable to the instant case, that "this record contains nothing to show, as a matter of fact, that the public acts of Ohio had by law or usage in Ohio any other effect than was given them by the Court of Appeals of Kentucky."

It is apparent from the record in this case that the Supreme Court of California was careful to follow, and correctly followed, the decisions of the Supreme Court of Ohio in determining the proper construction of Ohio statutes and the effect of the statutory assessment; but even if the California court had erred in construing the Ohio statutes, no reviewable federal question would have been presented.

Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93, 37 Sup. Ct. 344, 61 L. Ed. 610;

Banholzer v. New York Life Ins. Co., 178 U. S. 402, 20 Sup. Ct. 972, 44 L. Ed. 1124.

III.

SUMMARY OF ARGUMENT.

A. The law of the forum (California) governs with respect to the meaning, effect and application of the statute of limitations.

B. The law of the corporate domicile (Ohio) determines the nature of the substantive liability, the conditions essential to its creation and the legal effect of the administrative assessment.

C. The decisions of the highest court of Ohio are controlling with reference to the interpretation and the effect of Ohio statutes and constitutional provisions.

D. The full faith and credit clause of the federal constitution requires that the public acts of Ohio be given, in California, the same (not greater) effect that they are given in Ohio.

E. In Ohio the administrative assessment was given the effect of a mere procedural step, not a condition precedent to the existence of the substantive liability which became fixed and enforceable immediately upon the failure of the bank.

F. The California Supreme Court, in the light of an examination of Ohio decisions, gave to the administrative assessment precisely the same dignity, force and effect that it was accorded by the Supreme Court of Ohio, namely, that of a procedural step, not essential to the existence of the direct and primary liability which was created by the self-executing provisions of the Ohio Constitution.

G. The fact that the California statute of limitations began to run upon the failure of the bank (that being the event which, under Ohio law, created the substantive liability) achieved no unconstitutional result, notwithstanding that the subsequent making of an assessment may have been one of the administrative or procedural steps necessary to be taken by the Superintendent of Banks in order to perfect his right to sue.

H. The California statute of limitations, as applied to the instant case, did not, either in theory or in fact, operate to deny the Ohio Superintendent of Banks a reasonable opportunity to enforce the Ohio liability in the state of California.

I. Since the California statute of limitations has always been applied, uniformly and consistently, to actions upon liabilities created by law, irrespective of the state or country of origin, the present application of the statute involves no violation of the privileges and immunities clause of the federal constitution.

J. The case presented is not one involving a matter of such public or general importance as to warrant granting the discretionary writ, particularly in view of the fact that in November, 1936, the provisions of the Ohio Constitution, under which the present case arose, were repealed, the repeal being effective on July 1, 1937.

IV.

ARGUMENT.

A. The Law of the Forum (California) Governs With Respect to the Meaning, Effect and Application of the Statute of Limitations.

It is an elementary proposition that the application of the statute of limitations is purely a matter of local law with respect to which the law of the forum is controlling, irrespective of the place of origin of the substantive right sought to be enforced.

Platt v. Wilmot, 193 U. S. 602, 24 Sup. Ct. 542, 48 L. Ed. 809;

Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986;

McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177.

B. The Law of the Corporate Domicile (Ohio) Determines the Nature of the Substantive Liability, the Conditions Essential to Its Creation and the Legal Effect of the Administrative Assessment.

There can be no question but that "the nature, the extent, and the conditions of the liability of a stockholder * * * depend primarily upon the laws of the state or country by which the corporation was created." It was so held by this court in *Harrigan v. Bergdoll,* 270 U. S. 560, 46 Sup. Ct. 413, 70 L. Ed. 733, involving facts closely analogous to those of the instant case. In *Harrigan v. Bergdoll* the Pennsylvania courts had held that the action to enforce a stockholder's liability was barred by the statute of limitations, notwithstanding that the action

had been commenced within less than the statutory period following the levy of an assessment. In that case, as in this, the plaintiff complained that the Pennsylvania courts had failed to give proper effect to the assessment.

This court sustained the judgment of the Pennsylvania courts, pointing out that under the law of the state wherein the corporation was created "the liability became absolute without an assessment," and "that the order of assessment and levy is a purely administrative proceeding preliminary to the institution of a suit." It was further pointed out that it had long been settled by the decisions of the Supreme Court of Pennsylvania that the applicable statute of limitations began to run against the enforcement of the stockholder's liability from the time that the insolvency of the corporation became apparent.

It is manifest that in the instant case the Supreme Court of California gave full recognition to these settled principles of law. This is indicated by the following language of the California court: "To determine when the liability was created the full faith and credit clause of the United States Constitution (Art. IV, Sec. 1) requires recourse to the applicable constitutional provisions, statutes and decisions of Ohio (*Converse v. Hamilton*, 224 U. S. 234, 32 Sup. Ct. 415, 56 L. Ed. 749)." This recognition is further manifested by the Ohio decisions which are cited and discussed in the decision of the Supreme Court of California.

C. The Decisions of the Highest Court of Ohio Are Controlling With Reference to the Interpretation and the Effect of Ohio Statutes and Constitutional Provisions.

Petitioner lays the foundation for a fallacious argument by emphasizing a similarity in the language patterns of the National Bank Act and of the Ohio banking statutes. Solely on the basis of this similarity petitioner seeks to obtain acceptance of a conclusion which clearly is a *non-sequitur:* That the legal effect of an assessment levied by the Ohio Superintendent of Banks pursuant to the authority of Ohio statutes is necessarily the same as that of an assessment levied by the Comptroller of the Currency under the authority of the National Bank Act. For at least two reasons petitioner's conclusion is entirely erroneous:

(1) It takes no account of vital and fundamental differences arising from the fact that the Ohio liability here involved was created by a self-executing provision of the Ohio Constitution; and

(2) It disregards the controlling character of Ohio interpretive decisions holding that the Ohio liability arising under the constitutional provision was direct and primary; that the Ohio statutes enacted in aid of the constitutional provision were purely procedural and that the constitutional liability matured and became fixed upon the failure of the bank, independent of any procedural steps that might ensue in the course of its enforcement.

In short, petitioner attempts, by the method indicated, to clothe the Ohio assessment with attributes which it does not possess and to give it a force and effect which the Ohio decisions definitely show that it never possessed. Respondent urges that the Ohio constitutional provision, the Ohio statutes and the assessment levied pursuant thereto are entitled, respectively, to the effect which the Supreme Court of Ohio has accorded to them, neither more nor less.

D. The Full Faith and Credit Clause of the Federal Constitution Requires That the Public Acts of Ohio be Given, in California, the Same (Not Greater) Effect That They Are Given in Ohio.

Under our next succeeding point heading we shall refer to certain Ohio decisions for the purpose of showing the force and effect accorded to the statutory assessment in the state of Ohio. It will readily appear from this examination that the assessment was a mere *procedural* step, and not a prerequisite to the existence of the substantive liability. It is evident, therefore, that petitioner seeks to give to the assessment greater force and effect than is accorded to it in the state of Ohio. The full faith and credit clause of the federal constitution would, in truth, be violated if petitioner's position were sustained.

As stated in *State of Ohio v. Chattanooga, etc., Co.*, 289 U. S. 439, 53 Sup. Ct. 663, 77 L. Ed. 1307, "the full faith and credit clause does not require that greater effect be given the Tennessee (Ohio) statute elsewhere than is given in the courts of that state."

One of the decisions cited in support of the foregoing statement is *Robertson v. Pickrell,* 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049, wherein the following language is found:

> "The Act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Works v. Columbia Coll.,* 17 Wall. 529."

The decisions in *Great Western Telegraph Co. v. Purdy,* 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986, hereinafter discussed, and in *Harrigan v. Bergdoll,* 270 U. S. 560, 46 Sup. Ct. 413, 70 L. Ed. 733, discussed *supra,* illustrate the vital difference between assessments which create the *substantive* right and assessments which are merely *procedural.* These two decisions also furnish illustrations of limitation statutes which commenced to run prior to the levy of procedural assessments.

E. In Ohio the Administrative Assessment Was Given the Effect of a Mere Procedural Step, Not a Condition Precedent to the Existence of the Substantive Liability Which Became Fixed and Enforceable Immediately Upon the Failure of the Bank.

The Ohio banking statutes, subordinate to the constitutional provision, and all acts of the Superintendent of Banks by authority of such statutes were purely procedural or administrative and wholly incompetent to create or modify the substantive liability of the stockholders or the correlative rights of the creditors of the bank.

Snider v. United Banking and Trust Co., 124 Ohio St. 375, 178 N. E. 840;

Squire v. Solinski 132 Ohio St. 180, 5 N. E. (2d) 479.

The Ohio substantive liability, created solely by operation of the self-executing constitutional provision, was a direct and primary liability which became enforceable by the bank's creditors immediately upon the failure of the bank.

Snider v. United Banking & Trust Co., supra;

Squire v. Solinski, supra;

State v. Bremer, 130 Ohio St. 227, 198 N. E. 874;

Squire v. Standen, 135 Ohio St. 1, 18 N. E. (2d) 608;

Andrews v. State, 124 Ohio St. 348, 178 N. E. 581;

State v. Coburn, 133 Ohio St. 192, 12 N. E. (2d) 471.

As representative of the creditors, the Superintendent of Banks acquired the right to enforce the constitutional

liability only upon his taking possession of the bank for purposes of liquidation. Prior to that time the right of action resided in the creditors.

Fulton v. Wetzel, 47 Ohio App. 72, 190 N. E. 776;

Snider v. United Banking & Trust Co., supra;

Feldman v. Standard Trust Bank of Cleveland, 46 Ohio App. 67, 187 N. E. 743.

In a decision by an Ohio court involving the same bank and the same liability which are involved in the instant case, the following language may be found (*Squire v. Abbott*, 8 Ohio Opinions 134):

> " 'The liability imposed by Section 3, Article XIII of the Ohio Constitution is not a secondary one but a primary one. Upon the insolvency of the bank the obligation is immediately enforceable before the assets of the bank have been liquidated, and it is unnecessary for the Court to determine whether the assets of the bank are sufficient to pay its liabilities.' "
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> * * * * * * * *
>
> "It follows then that when the bank fails to meet its obligations in the regular course of business the obligations of a stockholder to the depositor and creditor become defined and fixed."

In *Squire v. Solinski, supra*, the Ohio court stated that the Ohio banking statutes "are regulatory and procedural, and neither augment nor diminish the constitutional rights of creditors."

In *State v. Bremer, supra*, the Supreme Court of Ohio said:

> "The superadded liability is created by constitutional mandate. * * *

> "This court held in the case of Snider v. United Banking and Trust Co., 124 Ohio St. 375, 178 N. E. 840, an action to enforce the superadded liability, that the provisions of the section herein involved, in so far as the authority and duty of the Superintendent of Banks with relation to insolvent banks were concerned, were regulatory and procedural."

In *Snider v. United Banking & Trust Co., supra,* the Ohio Supreme Court stated:

> "The provisions of the banking code are procedural, not substantive, in nature. They create no rights in favor of either the corporation, its stockholders or creditors. It is the purpose of that code to regulate merely."

F. The California Supreme Court, in the Light of an Examination of Ohio Decisions, Gave to the Administrative Assessment Precisely the Same Dignity, Force and Effect That It Was Accorded by the Supreme Court of Ohio, Namely, That of a Procedural Step, Not Essential to the Existence of the Direct and Primary Liability Which Was Created by the Self-executing Provisions of the Ohio Constitution.

Reference to the decision of the California Supreme Court in this case readily discloses that in determining the legal effect of the assessment, the Ohio decisions were faithfully followed. The fact that under the Ohio constitutional provision the liability became definite, fixed and enforceable immediately upon the failure of the bank is beyond reasonable doubt or controversy. The fact that the levy of an assessment by the Ohio Superintendent of Banks is a mere *procedural* step, having nothing to do with the creation of the substantive liability, is equally clear.

G. The Fact That the California Statute of Limitations Began to Run Upon the Failure of the Bank (That Being the Event Which, Under Ohio Law, Created the Substantive Liability) Achieved No Unconstitutional Result, Notwithstanding That the Subsequent Making of an Assessment May Have Been One of the Administrative or Procedural Steps Necessary to be Taken by the Superintendent of Banks in Order to Perfect His Right to Sue.

The truth of the foregoing proposition is conclusively demonstrated by the decisions of this court in *Great Western Telegraph Co. v. Purdy,* 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986, and in *Harrigan v. Bergdoll,* 270 U. S. 560, 46 Sup. Ct. 413, 70 L. Ed. 733. The latter decision we have discussed above.

The question presented in *Great Western Telegraph Co. v. Purdy* was whether or not the Iowa courts had accorded full faith and credit to an assessment levied against a stockholder of an Illinois corporation by the judgment of an Illinois court. In that case, as in the case at bar, the courts of Iowa held that the action to enforce the liability was barred by the applicable Iowa statute of limitations. In that case, as in the case at bar, the applicable statute began to run prior to the levy of the assessment.

This court held that the courts of Iowa in thus applying the Iowa statute of limitations did not deny full faith and credit to the Illinois assessment, the language of this court being as follows:

> "The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to author-

> ize the receiver to bring suits against stockholders for the same, but not to determine whether the present defendant, or any other particular stockholder, was liable for anything, the Iowa court, by sustaining the defense of the statute of limitations, did not deny to the judicial proceedings of Illinois the full faith and credit to which it was entitled."

Reference to the decision of the Supreme Court of California in the case at bar discloses that the same force and effect was accorded the Ohio assessment. After referring to the Ohio decisions, the California court said:

> "In those cases the courts of Ohio recognized that the liability which was enforced by an assessment was the direct and primary stockholder's liability, even though the necessity therefor and the amount thereof be determined exclusively and finally by the fact and the amount of the assessment."

As we have already pointed out, the decision of this court in *Harrigan v. Bergdoll,* 270 U. S. 560, 46 Sup. Ct. 413, 70 L. Ed. 733, demonstrates the valid distinction to be drawn between assessments which are mere procedural prerequisites and assessments which create the substantive right. That decision demonstrates the fallacy of the contention in this case that the action "is based upon the assessment." The decision also clearly shows that a statute of limitations which commences to run against a stockholder's liability from the date of the insolvency of the corporation is not unconstitutional in its operation merely because the subsequent levy of an assessment may be a necessary procedural step in order to perfect the right of an administrative official to bring an action to enforce the liability.

Limitation statutes which begin to run against actions for the enforcement of stockholders' liabilities from the date of the insolvency of the corporation are not unusual.[3] In *Moran v. Cobb,* 120 Fed. (2d) 16 (1941), the United States Court of Appeals for the District of Columbia was called upon to consider the application of an Arizona statute of limitations which was held to have begun its running from the date of the closing of the bank involved. In the opinion, as prepared by Associate Justice Miller, it is recognized that a subsequent determination of insolvency remained "an essential condition of suit," and that, as a practical matter, the application of the statute required that such determination be completed and that the suit be filed within three years from the date of the failure of the bank. It was held however, that the existence of such procedural requirement did not affect the validity of the statute of limitations.

H. The California Statute of Limitations, as Applied to the Instant Case, Did Not, Either in Theory or in Fact, Operate to Deny the Ohio Superintendent of Banks a Reasonable Opportunity to Enforce the Ohio Liability in the State of California.

Petitioner relies upon the decision in *Broderick v. Rosner,* 294 U. S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100, asserting that the California statute of limitations, in its application here, is similar to the New Jersey statute under consideration in the cited case. Brief analysis will suffice to show that the decision is not in point and that the

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[3]See Annotation: "When Limitation Begins to Run Against Action to Enforce Stockholder's Superadded Liability," 137 A. L. R. 788.

statute challenged in *Broderick v. Rosner* bears no resemblance whatever to the California statute of limitations, either in nature or in effect.

The New Jersey statute involved in *Broderick v. Rosner* was not a statute of limitations. It is true that said statute purported to affect only the *remedy* for the enforcement, as against New Jersey residents, of stockholders' liabilities created by the laws of other jurisdictions. However, it was perfectly clear that the purpose, and the necessary effect, of that statute was absolutely to prevent the enforcement of such liabilities in New Jersey. This unconstitutional purpose was sought to be accomplished by imposing procedural requirements which could not possibly be fulfilled.

The California statute here involved is a true statute of limitations. Neither in fact nor in theory did the California statute operate to deny, or unreasonably to restrict access to the California courts for the enforcement of the Ohio liability.

According to the decision of the Supreme Court of California, the California statute commenced to run as against this liability on February 27, 1933, that being the date of the failure of the bank and the time when a cause of action accrued to the creditors upon the constitutional liability. The Superintendent of Banks took possession for the purpose of commencing liquidation on June 15, 1933, and thereby became a statutory trustee for the creditors in proceedings for the enforcement of the liability on their behalf. Thus, it is apparent that the operation of the California statute allowed the creditors of the bank three years from the accrual of their cause of action, and it allowed the Superintendent, their trustee, a period

of two years and eight months from the time he took possession of the bank for liquidation purposes within which to sue in California.

It is a stipulated fact in this case that the Ohio Superintendent of Banks levied the assessment on July 30, 1934. Accordingly, on the date of the levy of the assessment there yet remained a period of one year and seven months within which the Superintendent of Banks of Ohio could have commenced the action in California.

In applying the California statute in the present case, the Supreme Court of California held that the substantive right was "created" within the meaning of the statute at the same time that a cause of action accrued to the creditors of the bank under Ohio law, *i. e.*, upon the failure of the bank. Therefore, in relation to the instant case, the fact that the California statute runs from the creation of the substantive right, rather than from the time a cause of action accrues thereon, is without significance. The right was created and a cause of action accrued to the creditors at the same time and upon the occurrence of the same event.

In the face of these undeniable facts, it is futile for petitioner to contend that the California statute of limitations, as applied to this case, operated to deny, or unreasonably to restrict, the California remedy. Applicable here is the established principle that the constitutionality of statutes is not determined in the abstract, but only in relation to the facts of the particular case in which the statute is challenged.

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 Sup. Ct. 106, 66 L. ed. 239.

I. Since the California Statute of Limitations Has Always Been Applied, Uniformly and Consistently, to Actions Upon Liabilities Created by Law, Irrespective of the State or Country or Origin, the Present Application of the Statute Involves No Violation of the Privileges and Immunities Clause of the Federal Constitution.

Petitioner's contention that the decision in the instant case so operates as to constitute a violation of the privileges and immunities clause of the federal constitution appears to be without substance. As the Supreme Court of California correctly said:

> "To give proper effect to the Ohio law in this case obviously is not a violation of the privileges and immunities clause of the United States Constitution. The time limitation of said section 359 is applied uniformly to compute the applicable period of limitation for the commencement of the action from the time the liability was created."

The record here fails to show that the applicable California statute of limitations is not uniformly applied. In truth, this statute has always been applied by the California courts with uniformity and consistency.[4]

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[4]Cases cited Note 2, *supra*.

J. The Case Presented Is Not One Involving a Matter of Such Public or General Importance as to Warrant Granting the Discretionary Writ, Particularly in View of the Fact That in November, 1936, the Provisions of the Ohio Constitution, Under Which the Present Case Arose, Were Repealed, the Repeal Being Effective on July 1, 1937.

In view of the repeal[5] of the Ohio constiutional provision giving rise to the liability here involved, it is apparent that the cause is not one of great public or general importance.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 43 Sup. Ct. 422, 67 L. ed. 712.

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[5]Volume 11, Page's Ohio General Code Annotated, Part Two, page 299 (Constitution).

Conclusion.

It is submitted, therefore, that petitioner has failed to present any substantial federal question. In its decision of this case, the Supreme Court of California has given to Ohio constitutional and statutory provisions the same interpretations and the same effect that they have been given by the highest court of the state of Ohio. In other words, the public acts of Ohio were given the fullest faith and credit. No question is presented which merits the further consideration of this Honorable Court.

Respectfully submitted,

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